

Juarez-Baez v. Gonzales, No. 03-72508 (Pasadena - Feb. 8, 2006)

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BYBEE, Circuit Judge, dissenting.

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I cannot agree that counsel's performance in this case "fell below an objective standard of reasonableness" as required by *Strickland v. Washington*, 466 U.S. 668, 688 (1984). We may find ineffective assistance only in egregious cases, where "counsel's performance rendered the proceeding . . . so fundamentally unfair that [Juarez-Baez] was prevented from reasonably presenting [her] case." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (internal quotation marks omitted); *see also Castillo-Perez v. INS*, 212 F.3d 518, 522 (9th Cir. 2000) (finding ineffective assistance where counsel failed to file an application for suspension of deportation, and erroneously informed his client that the application had been timely filed). Counsel is presumed to have assisted effectively. *Pizzuto v. Arave*, 280 F.3d 949, 954 (9th Cir. 2002) ("there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance") (internal quotation marks omitted). Before we condemn his assistance, we must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994). In sum,

[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 688.

We review the BIA's denial of a motion to reopen for an abuse of discretion, *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), and "[u]nless the BIA acted arbitrarily, irrationally, or contrary to law, we should not disturb the BIA's ruling." *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000) (internal quotation marks omitted). Although we review Juarez-Baez's due process claim of ineffective assistance de novo, *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1222 (9th Cir. 2002), "[w]e review findings of fact regarding counsel's performance for substantial evidence." *Lin*, 377 F.3d at 1024. *Cf. Id.* (reviewing factual findings underlying an ineffective assistance of counsel claim de novo where the BIA "did not consider or give weight to the new evidence"); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044-45 (9th Cir. 2000) (reviewing de novo ineffective assistance claims first made in a habeas proceeding before the district court and not previously considered by the BIA). Here, the BIA reviewed Juarez-Baez's new evidence concerning her daughter's health and found it "uncorroborated" and

“wholly contradictory” with the medical record and with Juarez-Baez’s original testimony. [AR 2]

There was substantial evidence supporting the BIA’s determination. This is not a case where counsel failed to investigate an important aspect of the case.

Unlike Lin’s attorney, who was “unprepared; had not expected to argue; did not seek out the evidence she should have found; did not present effectively the evidence she had at hand; presented no legal framework for an asylum claim; and left her client alone, bewildered, and unrehabilitated as a witness,” *Lin*, 377 F.3d at 1027, Juarez-Baez’s counsel asked his client to submit all available documentation on her daughter’s condition and included presented her medical report to the IJ.

[AR 2] He questioned her about Esmerelda’s health both before and at the hearing. Through counsel’s examination, Juarez-Baez informed the judge that Esmerelda had two heart murmurs, requiring two surgeries, and that the most recent surgery had taken place three years before the hearing. [AR 108-109] When counsel asked Juarez-Baez if the heart problems were “over with,” she affirmed that they were, “[r]ight now thanks to God for doing that.” [AR 118] Counsel continued to question her, revealing that Esmerelda needed yearly check-ups and suggesting that should she become ill after deportation to Mexico, there would be no specialist available to care for her. [AR 119, 123].

We must decide whether her counsel was constitutionally required to do more than this—to call Esmeralda’s doctors, request additional records, or perhaps order additional medical evaluations in the hope that additional evidence would contradict both Juarez-Baez’s testimony and Esmeralda’s medical report showing there was little likelihood of continuing complications.¹ Indeed, Juarez-Baez has submitted no reports predating her January 2000 hearing, and this suggests that there were no additional records for counsel to discover.² Although Juarez-Baez now contends that her daughter suffered from shortness of breath, “rac[ing]” heartbeat, and that she used medications and oxygen at the time of the hearing, there is no evidence that she told counsel about these difficulties when he asked about Esmeralda’s health. [AR 23] In fact, the BIA found that these contentions

¹ Esmeralda had no health coverage at the time of the hearing, and presumably Juarez-Baez would have had to pay out-of-pocket for any additional examinations. [AR 111]

² The majority suggests that the IJ’s asking “Why don’t we have a doctor’s letter saying she still needs medical attention” and government’s comment that the letter provided was three years old represent condemnation of counsel’s performance. Maj. at 3. However, the comments suggest that, as the BIA later determined, there was no evidence that Esmeralda had serious health problems at the time of the hearing. These observations provide no evidence that medical records sufficient to warrant relief could have been obtained, and the BIA subsequently rejected Juarez-Baez’s testimony otherwise. The evidence does not compel a contrary result. *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003).

contradicted Juarez-Baez's hearing testimony.³ The BIA further found that counsel was not ineffective because, at the time of the hearing, "respondent herself did not indicate that her daughter's medical condition was, as she now contends, worsening or required anything more than checkups." [AR 03]. Because "[we] review [the BIA's] findings of fact regarding counsel's performance for substantial evidence," we owe the finding great deference. *Lin*, 377 F.3d at 1024.

Because counsel had no reason to suppose that continued investigation would reveal useful evidence, I cannot condemn his decision not to expend any more resources on medical research, even under de novo review. The Supreme Court has recognized that counsel cannot pursue all possible avenues of research in a given case because "[l]imitations of time and money . . . may force early strategic choices, often based solely on conversations with the defendant." *Strickland*, 466 U.S. at 681. In investigating Esmeralda's congenital heart problems, "[n]o doubt

³Juarez-Baez now claims that at the time of the hearing her daughter experienced shortness of breath on short walks, at the hearing she testified that she took Esmeralda to the park to play on weekends, and that "[w]e just go anywhere and everywhere for outings." [AR 44] Juarez-Baez's current description of oxygen usage is itself contradictory. She affirmed that "I had an oxygen tank in the house for a year after surgery," suggesting that oxygen administration had ceased by the time of the hearing. [AR 23] She then stated that "to this date, I give [Esmeralda] oxygen at home," suggesting continual usage, implicitly including the time of the hearing. [AR 23] Juarez-Baez presented no documentation to show that Esmeralda took any medications at the time. [AR 2]

counsel could have done more; more is always possible.” *Pizzuto*, 280 F.3d at 969. Counsel’s failure to conduct a more detailed investigation into Esmeralda’s health did not, however, render the proceeding “so fundamentally unfair” that petitioner “was prevented from reasonably presenting [her] case.” *Lin*, 377 F.3d at 1027 (internal quotations marks omitted).

Not only was counsel reasonable in not expending resources on a medical investigation, he likely made a sensible tactical decision not to do so. From the information he had been given, it looked as if Esmeralda’s health was improving. She had not required anything more than a check up in the recent past, and her medical report predicted that “[g]iven the small size of the residual ventricular septal defect, no cardiovascular symptoms would be suspected, nor any effect on her growth, development, or future lifestyle.” [AR 180] If we presume that Esmeralda’s mother told her attorney the same story she later gave the IJ (she does not allege that she informed him of any health problems not revealed at the hearing), Esmeralda’s problems were “over with.” [AR 118] Thus at the time of the hearing, counsel could have reasonably decided that ordering additional records, conducting physician interviews, or requesting the Esmeralda get a more recent check-up would only reveal an improvement in her health, making it less likely that her mother could show hardship. In that case, “it would have been

foolhardy for counsel not to let sleeping dogs lie.” *Pizzuto*, 280 F.3d at 967 n.7; *see also Burger v. Kemp*, 483 U.S. 776, 790 (1987) (holding that failure to present evidence was a reasonable tactical decision where it might prompt a “foreseeably devastating cross-examination”).

In addition to her claim that counsel did not adequately research Esmeralda’s health condition, Juarez-Baez alleges that he is responsible for failing to correct her testimony that her mother is a doctor in a Mexican hospital. Her mother is, Juarez-Baez now explains, a nurse. Counsel had no reason to suspect a mistake had been made because the IJ questioned Juarez-Baez very closely on the subject, repeatedly referring to doctors and nurses. Juarez-Baez gave no indication that there had been a misunderstanding. [AR 123-125, 129] Petitioner herself had studied nursing, so counsel could reasonably presume that she knew the difference between a doctor and a nurse. The BIA did not abuse its discretion in finding that this mistake was attributable to Juarez-Baez herself, rather than to any mistake of counsel. [AR 3]

Since Juarez-Baez’s appeal, it appears Esmeralda has developed additional medical problems: Her sternum failed to properly heal after her surgery, causing spinal deformities that may require surgery. [Blue Br. Appendix] The proper course of action is for Juarez-Baez to petition the BIA to reopen in consideration of this newfound evidence of hardship. It is this new information, rather than

counsel's performance at the hearing, that now casts doubt on whether deportation is appropriate. "[T]he facts of [this] particular case, viewed as of the time of counsel's conduct" do not show that his service fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 690. Juarez-Baez's remedy lies not in blaming her counsel, but in seeking to reopen her case before the BIA.

I respectfully dissent.